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Office of Administrative Law Judges
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Issue Date: 26 March 2004

Case No.: 2002-LHC-1788
DOL No.: 06-184462

In the Matter of:

RUTH KNIGHT, Widow of
CALVIN ALVIN KNIGHT, Deceased,
Claimant

v.

JACKSONVILLE SHIPYARDS, INC.,
Employer

ACE/INA c/o ARM INSURANCE SERVICES/
CNA CASUALTY INSURANCE OF FLORIDA,
Carriers

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:[1]

David N. Neusner, Esq.
For Mrs. Knight

Bonnie J. Murdock, Esq.
For ACE/INA

Neil A. Morholt, Esq.
For the Director, OWCP

BEFORE: Robert L. Hillyard
Administrative Law Judge

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[1] CNA Casualty Insurance of Florida was not represented at the hearing, but filed a post-hearing brief in support of its position.

DECISION AND ORDER - DENIAL OF BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the Act), brought by Ruth Knight, Widow of Calvin Knight (Mrs. Knight), against Jacksonville Shipyards, Inc. (JSI or Employer), ACE/INA c/o Arm Insurance Services, Carrier, and CNA Casualty Insurance of Florida, Carrier. The formal hearing was conducted in Jacksonville, Florida, on June 16, 2003. Each party was represented by counsel and each presented documentary evidence, was given the opportunity to examine and cross-examine the witnesses, and filed written briefs.[2] All briefs have been filed and carefully reviewed. The following exhibits[3] were received into evidence: Mrs. Knight's Exhibits 1-20, Employer's Exhibits A-I, and Director's Exhibits A-E. This decision is based on the entire record after consideration of the arguments of the parties.

At the hearing, the undersigned took under advisement the Employer's renewed Motion for Summary Decision (Tr. 8). I incorporate the Employer's arguments from that Motion into the arguments presented on the merits and now consider all arguments together.

Issues

1. Whether Calvin Knight's death was caused by or hastened by a work-related injury or disease; and,

2. Whether ACE/INA or CNA is a Responsible Carrier/ Bondholder.

The findings and conclusions that follow are based upon my observation of the appearance and the demeanor of the witness who testified at the hearing, the witnesses who testified by deposition, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

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[2] CNA was not represented at the hearing, but did file a closing brief.

[3] In this Decision, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, "Tr." refers to the transcript of the June 16, 2003 hearing, and "Dep." refers to deposition.

Findings of Fact and Conclusions of Law

Background

Calvin Knight was born on May 4, 1932 and died on January 6, 2001, at the age of 68 (Tr. 20; EX B, pp. 12, 16). Mr. Knight had a fifth-grade education (EX B, p. 53). Mr. Knight is survived by his wife, Ruth (Crew) Knight, who was born on October 6, 1943, and who married Mr. Knight on July 31, 1964 (Tr. 12; CX 2). Ruth Knight was married to Calvin Knight until his death in 2001 and has not remarried (Tr. 20). Mrs. Knight has filed for funeral expenses and widow's benefits. Funeral expenses for her husband were $8,247.00 (CX 5). Social Security earnings records show that her husband was employed by Jacksonville Shipyards, Inc., from 1969 to 1992 (EX A).

Mr. Knight started smoking very young, perhaps as early as age eight, and smoked approximately three packs of cigarettes a day quitting in approximately 1997 (Tr. 23; EX B, p. 19). Mrs. Knight testified that her husband quit smoking because Dr. Wolfe, a treating physician, told him that he had emphysema and that he needed to quit (Tr. 26). Mrs. Knight stated that her husband suffered from high blood pressure, a back injury, and from shivers and shakes (Tr. 26). Dr. Wolfe never told either her or Mr. Knight that his breathing problems were a result of asbestos exposure (Tr. 25). Mr. Knight was on supplemental oxygen for the last nine years of his life. No autopsy was performed after his death (EX B, pp. 44, 49).

Each of the named Carriers insured JSI at different times. CNA provided insurance coverage for JSI from July 1, 1987 through June 30, 1989 (EX E). There was no listed coverage for JSI from July 1, 1989 through September 25, 1989 (EX E). ACE/INA insured JSI from September 26, 1989 through June 30, 1992 (EX E). ACE/INA posted bonds for future LHWCA claims against JSI during its insurance period (EX D). The relevant bonds include:

Bond Term	Amount of Bond	Status
9/26/89-6/30/90	$ 100,000	Exhausted
7/1/90-6/30/91	$ 100,000	Exhausted
5/16/91-6/30/92	$1,000,000	$66,752.33 remaining

(*See* EX D).

Nature and Extent of Mr. Knight's Work at JSI

Mrs. Knight and three of Mr. Knight's coworkers at JSI offered testimony as to daily work conditions, job duties, and potential asbestos exposure at JSI during Mr. Knight's employment.

Testimony of Ruth Knight

During his employment at JSI, Mr. Knight started as a helper and then was a lead man (Tr. 26). Mrs. Knight described some of her husband's duties as being a corker, a riveter, a pumper, and that sometimes he went into the bottom of a ship's oil tank to clear out oil and water residue (Tr. 27). He performed this work until JSI closed the shipyard sometime in 1992 (Tr. 17).

Mrs. Knight stated that her husband told her he would often wrap asbestos around his arms while riveting to keep hot metal scraps from burning his arms (EX B, pp. 29-30). She said that her husband did not remove asbestos from ships, but he was working nearby as asbestos removal was being performed (EX B, p. 30).

Mrs. Knight testified that she has no personal knowledge of Mr. Knight's asbestos exposure, that her knowledge of her husband's exposure was based on conversations she had with him, and that "all I can tell you is he came home with white stuff on his clothes" (Tr. 22; *see also,* EX B, p. 32). Mrs. Knight saw this "white stuff" on her husband's work clothes for several years as she washed his work clothes (Tr. 28). She stated that she stopped seeing the white dust on the work clothes approximately 10 years before he stopped working at JSI (or approximately 1982) (Tr. 22; EX B, p. 35).

John Davis, Uncle of Mr. Knight

Mr. Davis testified that Mr. Knight was his nephew and that he had worked with him for approximately 30 years (CX 4, p. 8). Mr. Davis stated that both he and Mr. Knight were exposed to asbestos every workday, as the steam pipes on all the ships were wrapped in asbestos (p. 8). When installing new steam piping on a repair job, Mr. Davis and Mr. Knight ripped asbestos off of the existing pipes to reach assembly hardware that held the old piping in place, allowing them to remove the old piping and to then re-attach replacement pipe (p. 21). During these repair

jobs, Mr. Knight was also exposed to dust from sandblasting and paint fumes (p. 12). Mr. Davis stated that although the shipyard hired asbestos companies to safely remove asbestos from work areas, he and Mr. Knight often continued their work in the affected areas while removal was being performed (p. 10). While the asbestos removal crews were working, "you could see [the asbestos] floating in the air" (p. 10).

On cross-examination, Mr. Davis testified that although he believed the steam pipes were wrapped in asbestos, he didn't know if the insulation was actually asbestos or some other material (p. 15). He never saw the word "asbestos" printed on any of the products wrapping the piping (p. 27). Davis acknowledged that he can't distinguish between asbestos and other materials (p. 14). "I don't know nothing about asbestos, really" (p. 14).

Mr. Davis stated that Mr. Knight hadn't smoked in a long time "if he smoked at all" (p. 25). Mr. Davis is pursuing continuing asbestos litigation and he has received small amounts of settlement monies from asbestos companies (p. 19).

Kyle Wheeler

Mr. Wheeler worked at JSI for approximately 23½ years starting in 1966 (EX G, pp. 4-5). Mr. Wheeler worked with Mr. Knight and describes Mr. Knight as a leaderman who assigned people to jobs (p. 5). As a result of those duties, Mr. Knight was on boats each workday, throughout the day (p. 5).

During their time together, Mr. Wheeler never personally saw Mr. Knight working in an area with asbestos (pp. 6, 16). Mr. Wheeler testified that asbestos was often found on boiler pipes on the ships being repaired (p. 7). When asbestos was found or suspected, the normal procedure was to alert the boss (p. 7). JSI would then seal off the area and keep everyone out while an asbestos removal company removed the loose material (p. 7). Mr. Wheeler cited as an example of this procedure his experience with the U.S.S. Marshfield (p. 9). When asbestos was discovered on the Marshfield, the ship was sealed off and all asbestos was removed before repairs were resumed (p. 9). Mr. Wheeler stated that after the cleanup aboard the U.S.S. Marshfield, neither he nor Mr. Knight ever worked onboard boats containing loose asbestos again (p. 10).

When asked about asbestos gloves, Mr. Wheeler responded that during his 23 years, he never saw Mr. Knight wearing such

equipment, although some welders did use asbestos gloves as part of their work (p. 16). Mr. Wheeler also testified that to the best of his knowledge, no buildings or piers at the shipyard contained asbestos (p. 17).

Ray Combs

Ray Combs' deposition was taken in an unrelated case, and was offered by the Employer as evidence of working conditions at JSI (EX C).

Mr. Combs was an employee of JSI for 20-21 years, starting in 1972 (p. 7). He testified that at all times, respirators were available for employees, including outside air-fed respirators, to deal with possible contamination in the air (p. 31). When an insulation problem was encountered, workers backed away from the potential asbestos and called for someone qualified to evaluate the situation (p. 31). JSI would then call a chemist who would take samples of the questionable product and test it for asbestos (p. 33). If asbestos was found, JSI would hire an abatement company to deal with the problem before actual repair work would begin (p. 33). Any loose insulation on the floor or a powdery, fibrous dust would trigger a call to the chemist (p. 33). After abatement, the air in the contaminated area had to meet OSHA standards before the repair crew was permitted back into the affected area (p. 43).

Mr. Combs explained this procedure through example. In 1989, the U.S.S. Marshfield was sent to JSI to convert the ship from A/C to D/C current and to replace a new steam engine turbine generator (p. 17). The existing generator contained steam pipes insulated with torn and frayed asbestos (p. 17). The JSI crew worked on the ship for approximately two to three weeks when asbestos was discovered and quarantine was imposed blocking off the affected areas (p. 20). The crew was pulled out and a firm was hired to encapsulate all of the insulation to make the work area safe again (p. 18). After encapsulation of the affected pipes and a vacuum cleaning of the area, the room was certified as asbestos-free and work resumed (p. 21).

Mr. Combs testified that after the U.S.S. Marshfield was decontaminated in March 1989, no other asbestos abatements were initiated at JSI (p. 39). He stated that welders used thick leather gloves, not asbestos gloves, and coats to protect themselves from hot metal (p. 26).

Medical Evidence

1. a. Dr. Bruce M. Yergin, Board eligible in Internal Medicine and Pulmonary Disease, summarized his review of Mr. Knight's medical records in a report dated August 23, 2002 (EX F). Dr. Yergin reviewed records from eight pulmonary physicians, multiple internists, and several primary care physicians located at the Mayo Clinic, St. Luke's Medical Center, St. Vincent's Medical Center, and Methodist Medical Center. Dr. Yergin noted a smoking history of approximately 150 pack years, ceasing in 1997, and noted various diagnoses including chronic obstructive pulmonary disease (severe), chronic bronchitis (severe), bullous emphysema, chronic respiratory insufficiency (oxygen dependent), squamous cell cancer of the lung with subcarinal lymph node metastasis, history of asbestos exposure, pleural thickening consistent with pneumonia (based on March 13, 2000 CT scan of chest), left upper lobe pneumonia (March 2000), bronchiectasis (September 2000), obstructive sleep apnea, coronary artery disease, S/P myocardial infarction (1993), S/P angioplasty (1993), hypertension, history of rheumatoid arthritis, osteoporosis, compression fractures of thoracic spine, chronic back pain, and S/P deep venous thrombosis of the left lower extremity.

Dr. Yergin noted that Mr. Knight related consistent past medical histories of chronic asbestos exposure. Despite this history, "none of the primary care physicians or internists noted physical findings consistent with asbestosis, and none of the eight examining pulmonary physicians noted any physical findings on the patient such as bibasilar crepitations or 'dry rales' which would be consistent with asbestosis."

Dr. Yergin stated that Dr. Sharpe's evaluation is inconsistent as she diagnoses asbestosis but she states that Mr. Knight's "breath sounds were clear." Such a physical finding does not support a diagnosis of asbestosis. Further, Dr. Yergin stated that Dr. Sharpe's diagnosis is contrary to the objective medical findings which found no evidence of asbestosis. Dr. Yergin noted that no radiologist interpreted x-rays to be consistent or suggestive of asbestosis. The September 2000 high resolution CT scan was negative for a clinical diagnosis of asbestosis. Pulmonary function studies indicate severe chronic obstructive pulmonary disease and do not show a pattern suggestive of asbestos-related dysfunction.

Dr. Yergin opined that Mr. Knight did not suffer from asbestosis, and even had he been exposed to asbestos products

while working at the shipyards, "such exposure, if any, did not cause, contribute to, or any way aggravate his multiple medical problems or his resulting death."

b. Dr. Yergin repeated the findings of his report in his July 9, 2003 deposition (CX 20). He stated that according to the American Thoracic Society, you would start a clinical diagnosis by finding a history of a significant asbestos exposure (Yergin Dep., p. 10). Next you would look for bilateral basilar crepitations or rales (Yergin Dep., p. 11). X-rays would provide findings such as bi-basilar fibrosis, diaphragmatic calcifications, pleural thickening, and pleural calcifications (Yergin Dep., p. 12). Pulmonary function studies would reflect a reduction in diffusing capacity (Yergin Dep., p. 12).

Dr. Yergin noted Mr. Knight's 150 pack year smoking history, and stated that such a history is clinically an "ominous sign" which places Mr. Knight at an increased risk for chronic bronchitis, emphysema, and lung cancer (Yergin Dep., p. 14). Dr. Yergin then used the history and the clinical method above to opine that the objective evidence did not support a finding of asbestosis (Yergin Dep., p. 16). Dr. Yergin noted that a history of asbestos exposure without objective findings cannot be sufficient to diagnose asbestosis (Yergin Dep., p. 16). Dr. Yergin reviewed all objective data and found nothing to support Dr. Sharpe's asbestosis diagnosis (Yergin Dep., p. 19). Dr. Yergin states that, in his opinion, Mr. Knight died from squamous cell carcinoma of the lung brought on by 150 pack years of cigarette smoking (p. 23).

Dr. Yergin reviewed Dr. Pohl's x-ray findings of bilateral interstitial fibrosis and opined that such a finding is a nonspecific finding, which would allow diagnosis of a variety of pulmonary diseases, only one of which would be asbestosis (Yergin Dep., p. 25). Dr. Yergin acknowledges that asbestos is a carcinogen, that asbestos exposure by itself can cause lung cancer, that one of the lung cancers that asbestos exposure can cause is squamous cell cancer, and that cigarette smoking is also a well known cause of lung cancer (Yergin Dep., p. 33). Dr. Yergin is familiar with the studies of interplay between asbestos exposure and cigarette smoking, which show that a smoker with exposure to asbestos is roughly 50 times more likely to develop lung cancer than the general population (Yergin Dep., p. 34).

c. Dr. Yergin's deposition was completed on August 28, 2003.[4] Dr. Yergin opined that the amount and duration of asbestos exposure would be relevant in analyzing whether a patient suffers from an asbestos-related disease (Yergin Dep., p. 19). Dr. Sharpe's report does not document an employment history suggestive of the manner in which Mr. Knight was exposed to asbestos, the environment in which he was exposed to asbestos, what products he may have been exposed to, or the quantity and duration of his potential exposure (Yergin Dep., p. 19). The history provided to Dr. Sharpe gives a reliable history of the possible calendar years of exposure, but it doesn't tell anyone whether there was significant exposure during the duration cited (Yergin Dep., p. 19).

2. The Florida Certificate of Death for Mr. Knight lists the immediate cause of death as pneumonia with underlying chronic obstructive pulmonary disease and lung cancer (CX 1).

3. a. Dr. Douglas A. Pohl, a Board-certified Medical Examiner and Pathologist, with a subspecialty of Cytopathology, issued a consultative report on July 15, 2001 (CX 3). Dr. Pohl noted Mr. Knight's smoking history and his occupational exposure to asbestos and stated that the long-term asbestos exposure fulfills the Helsinki Consensus Conference criteria for heavy exposure. Dr. Pohl does not list the duration or concentration of Mr. Knight's exposure.

b. Dr. Pohl repeated the findings of his report during his deposition on July 14, 2003 (CX 19). Dr. Pohl stated that asbestosis typically occurs after very heavy asbestos exposure (Pohl Dep., p. 8). "Asbestos fibers, through their interaction with cells in the lung, can induce genetic changes, that is, changes in the DNA of the cells, and those changes can occur very gradually and progressively leading ultimately to malignancy" (Pohl Dep., p. 9). Dr. Pohl testified that squamous cell carcinoma is one of the asbestos-related cancers which can affect the lungs (Pohl Dep., p. 10). Dr. Pohl stated that in addition to the medical records in evidence, he had the opportunity to review the depositions of John Davis, Ray Combs, Jr., and Ruth Knight (Pohl Dep., pp. 16-17). Dr. Pohl stated that a review of the medical records, along with information provided in the depositions "fully support the fact that [Mr. Knight] was significantly exposed to asbestos in a shipyard environment over a long period of time" (Pohl Dep., p. 17). Dr. Pohl opined that the long term and heavy asbestos exposure

[4] Page numbers on the August 28, 2003 deposition restarted at page one.

in the shipyards, coupled with Mr. Knight's smoking habit increased Mr. Knight's cancer risk in excess of 70-80 fold higher than a nonsmoker (Pohl Dep., p. 20). Dr. Pohl opined that "his asbestos exposure was a substantial contributing factor to the development of his lung cancer" (Pohl Dep., p. 20). Dr. Pohl stated that only a small percentage ("maybe two percent") of his practice is involved directly dealing with patients (Pohl Dep., p. 23), and that most of his time is analyzing tissues and specimens under a microscope (Pohl Dep., p. 23). Dr. Pohl agrees that squamous cell carcinoma is a cancer and not an asbestosis (Pohl Dep., p. 24). The 19 pathological slides reviewed by Dr. Pohl did not contain an adequate type of material to find the foreign bodies that Dr. Pohl would use as part of his evaluation and diagnosis (Pohl Dep., p. 26). All of the slides reviewed did contain cancerous tissue (Pohl Dep., p. 28). The slides were in no way diagnostic of asbestosis or asbestos-related disease (Pohl Dep., p. 28). Dr. Pohl agrees that there are over 100 different inflammatory processes that could produce interstitial fibrosis, but notes that the pattern of fibrosis distinguishes one process from another (Pohl Dep., p. 48).

Dr. Pohl testified that he relied upon a history of exposure provided to treating physicians by Mr. Knight, and he corroborated that exposure through review of the deposition testimony by Mrs. Knight and a coworker, through B reader x-ray interpretations, and through Dr. Sharpe's report in forming his diagnosis (p. 70).

4. Dr. Steven Michael Krawtz, Board certified in Internal Medicine, Pulmonary Disease, Critical Care, and a B reader, read a January 4, 1999 x-ray of Mr. Knight (CX 6). Dr. Krawtz interpreted the x-ray as category 1/1 and noted "bilateral interstitial lung disease consistent with [Mr. Knight's] asbestos exposure/asbestos related lung disease."

5. a. Dr. Isabella K. Sharpe examined Mr. Knight on August 20, 1992 (CX 7). Dr. Sharpe reviewed Mr. Knight's occupational history (shipyards from 1964 through 1992), symptomatology (daily cough, usually nonproductive), medical history (high blood pressure, chronic back pain), smoking history (52 years at 3 packs a day), and performed a physical examination (short of breath, breath sounds clear with quiet breathing, panting, and forced vital capacity maneuvers), pulmonary function test (hyperinflation and severe obstruction with some immediate benefit from inhaled bronchodilators), and x-ray (small irregular densities, honeycombing in the bases,

bilateral pleural plaques). Based on the data collected, Dr. Sharpe diagnosed asbestosis and asbestos-related pleural disease with some chronic obstructive pulmonary disease and probably some element of pulmonary emphysema. Dr. Sharpe noted that Mr. Knight's blood pressure was "far out of control."

b. Dr. Sharpe interpreted a four-view chest x-ray of Mr. Knight on July 19, 1994 (CX 10). Dr. Sharpe noted bilateral pleural plaques and bilateral plaqueing of the hemidiaphragms, thickening of the intralobar pleura, and small irregular opacities in the bases more than the apices, distribution 1/1, s/t. Dr. Sharpe opined that "these findings are most compatible with a diagnosis of asbestosis and asbestos-related pleural disease."

6. Dr. Susan M. Daum, Board certified in Internal Medicine and Preventive Medicine and a B reader, interpreted two x-rays of Mr. Knight (CX 11). She found both films to be of good quality and interpreted both films as category 2/1, s/t, with pulmonary and pleural asbestos-related changes.

7. Dr. Martin Northup interpreted an April 11, 1997 x-ray of Mr. Knight (CX 12). Dr. Northup noted increased opacity in both bases which appears to be bibasilar atelectasis or chronic scarring.

8. Mayo Clinic treatment records contain chest x-ray and CT scan reports dated November 14, 2000 through January 6, 2001 (CX 9):

X-Rays:

Date	Physician	Comments
11/14/00	Pietan	Interstitial fibrotic changes bilaterally. Marked wedging of many thoracic vertebral bodies.
12/29/00	Stearman	Irregular infiltrate and/or densities identified in the left upper lobe; other lung fields clear.
01/02/01	Stearman	Diffuse interstitial infiltrates, at least in the right upper lobe. No significant change in past several days. Moderate widening of the cardiomediastinal silhouette.

01/03/01	Kuzo	No significant change in moderate-sized bilateral pleural effusions and possible perihilar edema.
01/04/01	Burnett	Bilateral perihilar and basal interstitial densities suggesting edema, probably not significantly changed since 1/3/01.
01/05/01	Paz-Fumagalli	Possible small pleural effusions. Prominence of pulmonary vessels and diffuse interstitial changes may indicate CHF.
01/06/01	McComb	Persistent increased opacification both lower hemithoraces more pronounced on the left.

CT Scans:

Date	Physician	Comments
08/28/00	Adler	Diffuse emphysematous changes, within upper left lobe there is a focal area of linear opacity, with associated bronchiectatic changes identified which may be secondary to active infiltrate vs. chronic scar; mild adjacent pleural thickening; no pulmonary parenchymal nodules or masses; large subcarinal lymph node.
11/16/00	Deperi	Stable appearance of the lungs with diffuse emphysematous change, bronchiectasis and fibrosis.
12/13/00	Cernigliaro	Mild fibrosis in right lung base.

Narrative Reports:

A. Dr. Steven J. Buskirk examined Mr. Knight on December 7, 2000 (CX 9, p. 7). Dr. Buskirk reviewed Mr. Knight's history (suffered from severe emphysema and bronchiectasis), symptomatology (shortness of breath), two previous CT scans of the chest (large, subcarinal lymph node), bronchoscopy results, Mr. Knight's allergies and current medications, family history, smoking history (200 pack year history, quit 1997), and performed a physical examination (lungs clear to auscultation bilaterally, Mr. Knight using supplemental O_2). Dr. Buskirk did not document an occupational history. Dr. Buskirk diagnosed squamous cell carcinoma of the lung with definite subcarinal involvement and perhaps distant metastasis.

B. Dr. Buskirk re-examined Mr. Knight on December 19, 2000 (CX 13). Between December 7th and December 19th, Mr. Knight had undergone a bone scan, CT scan of the abdomen and pelvis, PET scan, and MRI of the brain and thoracic spine. Dr. Buskirk referred Mr. Knight to Dr. Moreno for diagnosis as a possible chemotherapy candidate.

Discussion and Applicable Law

Causation

Mrs. Knight argues that her husband's death due to lung cancer was caused by or hastened by his exposure to asbestos products while in the employ of Jacksonville Shipyards. Section 20(a) of the LHWCA presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the LHWCA, *i.e.*, that the death was work related. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982). In order to invoke this presumption, Mrs. Knight must establish a *prima facie* case. Mrs. Knight must establish: (1) that the decedent sustained a physical harm or injury; and, (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or injury. *Kier v. Bethlehem Steel Corp.*, 16 B.R.B.S. 128 (1994). The respondent can then rebut this presumption by producing evidence and proving that the workplace condition or stimulus neither caused nor aggravated the employee's condition. *Conoco, Inc. v. Director, OWCP*, 194 F.2d 684, 690 (5th Cir. 1999).

Assuming the respondent successfully rebuts the presumption, the Administrative Law Judge must then examine the

record as a whole to determine whether the preponderance of the evidence establishes that the employee's death was work related. *Sprague*, 688 F.2d at 865. "[I]f an injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the resultant condition is compensable…. This rule is consistent with the maxim that 'to hasten death is to cause it.'" *Woodside v. Bethlehem Steel Corp.*, 14 B.R.B.S. 601 (1982); *see also, Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 B.R.B.S. 104 (1993) (length of hastening is not significant).

Mrs. Knight has successfully made a *prima facie* case. First, Mr. Knight sustained a physical harm by contracting pneumonia brought on by advanced lung cancer (CX 1). Both Dr. Yergin and Dr. Pohl agree that lung cancer was a significant cause of Mr. Knight's death (CX 20, 19). Drs. Yergin and Pohl also agree that asbestos exposure, by itself, can cause the type of lung cancer contracted by Mr. Knight (CX 20, p. 33; CX 19, p. 9).

Second, conditions at work existed which could have caused the injury. Mr. Davis related stories of removing asbestos while installing new steam pipes during repair (CX 4, p. 21). Mr. Wheeler testified that asbestos was often found on boiler pipes in the ships being repaired (EX G, p. 7). Mr. Combs stated that asbestos was often found during repairs, requiring a special crew to be hired for removal (EX C, p. 31). Regardless of differences related by the individual witnesses, all coworkers on record testified that asbestos was encountered at the shipyard during repairs.

I find that Mr. Knight sustained an injury by contracting lung cancer, that asbestos exposure alone can cause the type of lung cancer suffered by Mr. Knight, and that asbestos was present at the workplace creating conditions which could have provided the exposure necessary to cause lung cancer. I find that Mrs. Knight has established a *prima facie* case.

The Employer must now rebut the presumption by proving that that the workplace conditions neither caused nor aggravated the employee's condition. *Conoco, Inc.*, 194 F.2d at 690. The Employer must present specific and comprehensive evidence sufficient to sever the potential causal connection. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 B.R.B.S. 92, 96 (1991).

Mrs. Knight's counsel points out that the underlying condition or injury sustained by Mr. Knight was not asbestosis,

but rather lung cancer (Mrs. Knight's brief, p. 7). The absence of asbestosis, therefore, is not substantial evidence to rebut the § 20(a) presumption that Mr. Knight's lung cancer developed from workplace exposure to asbestos. *Jones v. Aluminum Company of America*, 35 B.R.B.S. 37 (2001). The Employer offers the testimony of Dr. Yergin to rebut the contention that asbestos exposure caused or aggravated Mr. Knight's condition.

Dr. Yergin's opinion, however, is equivocal in nature. Equivocal evidence is not substantial evidence, and it cannot rebut the § 20(a) presumption. *Dewberry v. Southern Stevedore & Corp.*, 7 B.R.B.S. 322 (1977), *aff'd mem.* 590 F.2d 331, 9 B.R.B.S. 436 (4th Cir. 1978). While Dr. Yergin opines that asbestos was not related to Mr. Knight's lung cancer, Dr. Yergin agrees that asbestos is a carcinogen, that asbestos exposure by itself can cause lung cancer, and that one of the lung cancers that asbestos exposure can cause is squamous cell cancer, the same type which infected Mr. Knight (CX 20, p. 33). Dr. Yergin acknowledges studies which show that asbestos exposure coupled with cigarette smoking makes a person up to 50 times more likely to develop lung cancer than a person in the general population (CX 20, p. 34), but then fails to explain why Mr. Knight's lung cancer was not a result of that deadly combination of carcinogens.

Dr. Yergin notes that Mr. Knight relayed a consistent work history of asbestos exposure to all primary care physicians, yet none of them noted physical findings consistent with asbestosis (EX F). As discussed above, however, a finding of no asbestosis does not indicate that Mr. Knight's lung cancer was not caused or aggravated by Mr. Knight's occupational exposure. Further, a consistent work history provided to physicians actually tends to reinforce that Mr. Knight was continually exposed to asbestos during the periods cited.

Dr. Yergin opines that Dr. Pohl's finding of bilateral interstitial fibrosis is a nonspecific finding, but agrees that asbestosis is one of the conditions which could cause such a fibrosis (CX 20, p. 25).

Dr. Yergin opines that the amount and duration of asbestos exposure is relevant in analyzing whether a patient has an asbestos-related illness, but then admits that while the record shows the specific calendar years that Mr. Knight might have been exposed, it does not provide details into the manner of exposure, products that Mr. Knight might have been exposed to, or the quantity or duration of asbestos exposure (CX 20, p. 19).

Dr. Yergin discounts Dr. Sharpe's diagnosis, which was based upon an insufficient work history regarding exposure to asbestos, but then offers his own opinion based upon that same lack of information.

I find that the § 20(a) presumption has not been rebutted by the Employer's medical testimony. The Employer's medical evidence neither confirms nor denies that potential asbestos exposure conditions at JSI caused or aggravated Mr. Knight's lung cancer. To successfully rebut the § 20(a) presumption, therefore, the Employer must show that Mr. Knight was not exposed to asbestos during his employment at JSI.

The Employer offers the testimony of Mr. Wheeler and Mr. Combs to show that employees were protected from asbestos exposure during employment at JSI. Mr. Wheeler testified that in 23 years of working with Mr. Knight, he never saw Mr. Knight working in an area with loose asbestos (EX G, pp. 6, 16). Mr. Wheeler and Mr. Combs (who also had 20 years of employment with JSI (EX C, p. 7)) both testified that the normal procedure when asbestos was suspected was to immediately remove workers from the area, to physically seal off the area, and to confirm the existence of asbestos. Then, if necessary, JSI would hire a contractor to safely remove any contamination and to certify a safe working environment before allowing employees to resume work (EX G, p. 7; EX C, pp. 31-33, 43).

When asked about asbestos gloves allegedly worn by Mr. Knight, Mr. Wheeler stated that in 23 years he had never seen Mr. Knight wearing such gloves (EX G, p. 16). Mr. Combs stated that the welders used thick leather gloves to protect themselves, not asbestos gloves (EX C, p. 26).

Both Mr. Wheeler and Mr. Combs agreed that no asbestos abatement was performed in the shipyard after the U.S.S. Marshfield, which was completed in approximately March 1989 (EX G, p. 10; EX C, p. 39). Mr. Wheeler testified that no buildings or piers at the shipyard contained asbestos (EX G, p. 17).

While asbestos was encountered at JSI, the Employer had a functioning safety procedure in place to protect workers from asbestos exposure. Two JSI employees, each with over 20 years of experience with this shipyard, testified in separate depositions the exact same quarantine and abatement procedure. Mr. Wheeler worked with Mr. Knight for over 20 years, and he

never saw Mr. Knight working in an area with asbestos. Both employees discounted the asbestos gloves discussed by Mrs. Knight in her testimony.

Taken together, I find that the Employer's medical evidence shows that if Mr. Knight had been exposed to asbestos, such exposure could have caused or aggravated Mr. Knight's lung cancer. JSI's employee testimony, however, rebuts a causal connection through corroboration of a safety program that protected workers from asbestos exposure and through testimony that Mr. Knight was never seen working in an asbestos contaminated area. I find that the Employer has rebutted the *prima facie* case.

With the *prima facie* case successfully rebutted, I now examine the evidence as a whole to determine whether the preponderance of the evidence establishes that the employee's death was work related. *Sprague*, 688 F.2d at 865. Where an employee offers credible testimony that he was exposed to asbestos and that he later developed lung cancer, and where that testimony is not contradicted by the Employer, the lung cancer represents a work-related occupational disease. *Martin v. Kaiser Co.*, 24 B.R.B.S. 112, 118-119 (1990).

The Employer testimony provided by Mr. Wheeler and Mr. Combs is contrary to the testimony of Mrs. Knight and Mr. Davis.

Mrs. Knight testified that she had no personal knowledge of Mr. Knight's exposure to asbestos (EX B, pp. 29-30). She said that "all I can tell you is he came home with white stuff on his clothes" (Tr. 22). While asbestos was encountered at JSI up to and including the U.S.S. Marshfield abatement in 1989, Mrs. Knight testified that the "white stuff" on her husband's clothes stopped approximately 10 years before he quit working at JSI, or about 1981 (Tr. 22).

Asbestos abatements occurred as late as 1989, while the "white stuff" on Mr. Knight's clothes stopped around 1981, nearly eight years earlier. This suggests that the "white stuff" was unrelated to asbestos exposure and was instead some other substance encountered during the work day. Alternatively, if the white substance was asbestos (which cannot be corroborated), the discontinuance of the white powder suggests that any asbestos exposure ceased in approximately 1981 when Mr. Knight stopped coming home with the substance on his work clothing. I find that Mrs. Knight's testimony neither

corroborates nor precludes Mr. Knight's alleged exposure to asbestos.

Mr. Davis testified that Mr. Knight was exposed to asbestos every workday (CX 4, p. 8). Mr. Davis also stated that Mr. Knight was exposed to dust from sandblasting and paint fumes (CX 4, p. 12). Mr. Davis testified that although JSI had an abatement program in place, he and Mr. Knight often continued to work in the affected areas during the abatement process (CX 4, p. 10).

Mr. Davis' testimony is questionable in its probative value. On cross-examination, Mr. Davis stated that he didn't know if the pipes that he testified were asbestos-wrapped were actually covered in asbestos. He stated that he didn't know anything about asbestos, and testified that he never saw "asbestos" printed on any of the products wrapping the pipes (CX 4, pp. 14, 15, 27).

Mr. Davis's credibility is suspect as well. Mr. Davis is Mr. Knight's uncle, suggesting a possible family bias. Mr. Davis is in litigation with asbestos companies for the same type of alleged asbestos exposure as Mr. Knight, suggesting a possible financial bias. Finally, although Mr. Knight and Mr. Davis were family members and worked side-by-side for approximately 30 years, Mr. Davis testified that Mr. Knight hadn't smoked in a long time, "if he smoked at all," when it has been established by both the medical testimony and Mrs. Knight's testimony that Mr. Knight had a three pack per day habit for most of his life. This suggests either that Mr. Davis' testimony is factually incorrect or that Mr. Davis did not have nearly as close a working relationship with Mr. Knight as stated. I find Mr. Davis's testimony suspect and I afford it little weight in determination of Mr. Knight's asbestos exposure.

Taken as a whole, I find that the coworker testimony and the testimony of Mrs. Knight shows that while asbestos was encountered at times during ship repairs at JSI, a safety program was in place which protected workers from exposure to asbestos during their employment. As such, I find no credible evidence of asbestos exposure by Mr. Knight while working at JSI.

Additionally, however, Mr. Davis testified that Mr. Knight continued working in asbestos-contaminated areas while abatement was being performed. If Mr. Knight purposely entered asbestos-

contaminated work areas to resume work, thus intentionally bypassing JSI's abatement program (as alleged by Mr. Davis), he would have intentionally exposed himself to this carcinogen. If a worker's injury is the result of the employee's intentional misconduct, such conduct can be an intervening cause relieving the employer of liability. *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454, 457 (9th Cir. 1954). Although Mr. Davis' testimony is of questionable veracity, his testimony regarding purposeful entering of contaminated areas, if true, would weigh against finding the Employer liable.

The medical evidence fails to establish a causal connection between potential asbestos exposure and Mr. Knight's lung cancer. The Florida Certificate of Death lists the cause of death as pneumonia, due to lung cancer and chronic obstructive pulmonary disease (CX 1).

The Mayo Clinic records are silent as to any asbestos-related illness or etiology. Seven x-rays reviewed by seven different physicians made no mention of an asbestos-related condition which caused or aggravated Mr. Knight's lung cancer (CX 9). Three CT scans by three different physicians made no reference to asbestos causing or aggravating Mr. Knight's condition (CX 9). Dr. Buskirk's two reports list only lung cancer and are silent as to the etiology of the disease (CX 9). Dr. Northrup, who lists no x-ray credentials, interpreted one x-ray and did not make an asbestos-related diagnosis (CX 12).

Dr. Sharpe, the only examining physician to diagnose asbestosis, lists no credentials either in medical specialty or in the interpretation of x-rays (CX 7). Her diagnosis is not well reasoned. Dr. Sharpe notes a 52 year, 3 pack a day cigarette habit, but then fails to incorporate it into her diagnosis. Dr. Sharpe bases her diagnosis on a 28-year history of asbestos exposure, when it has been found above that Mr. Knight was not exposed to asbestos. While Dr. Yergin noted that the American Thoracic Society states that bibasilar crepitations and rales are normally associated with asbestosis, Dr. Sharpe found clear breath sounds with quiet breathing, panting, and on forced vital capacity maneuvers. Finally, Dr. Sharpe equivocally notes that her findings are "most compatible" with a diagnosis of asbestosis. Dr. Sharpe's reports, however, were made between 1992-1994, eight to ten years before the onset of Mr. Knight's lung cancer. Dr. Sharpe could not opine, therefore, whether Mr. Knight's lung cancer was caused by or aggravated by his alleged work-related asbestos exposure. Given Dr. Sharpe's lack of listed credentials, her

use of an inaccurate exposure history, her omission regarding Mr. Knight's substantial smoking history, and the silence of her opinion in regards to causation or aggravation of Mr. Knight's lung cancer by asbestos exposure, I find her medical opinion not well reasoned, and I afford it little probative value.

Dr. Pohl opined that Mr. Knight's "asbestos exposure was a substantial contributing factor to the development of his lung cancer" (CX 19, p. 20). Dr. Pohl based his opinion on a history of heavy exposure, upon the medical opinion and report of Dr. Sharpe, and upon x-ray interpretations by B readers (CX 19, p. 70). As noted above, Mr. Knight did not have a heavy exposure to asbestos during employment. The opinion of Dr. Sharpe has been found to be not well reasoned. While the x-ray interpretations of Drs. Daum and Krawtz diagnosed interstitial lung disease, Dr. Pohl acknowledged that there are over 100 different inflammatory processes that could produce interstitial fibrosis. Dr. Pohl states that squamous cell is a cancer and not an asbestosis, and he states that the 19 pathological slides that he reviewed did not contain adequate material to make a clear asbestos diagnosis, but that he did see cancer cells in each slide. Dr. Pohl only sees patients approximately 2% of the time, as most of his time is spent analyzing microscope specimens.

Dr. Pohl is not an Internist or Pulmonary Specialist, but rather a Pathologist. In his area of specialty, Dr. Pohl stated that the slides he reviewed were insufficient to make a clear determination. Given the use of an inaccurate exposure history and reliance on the questionable medical opinion of Dr. Sharpe, given x-ray interpretations with multiple possible diagnoses, and given Dr. Pohl's lack of medical credentials in Internal Medicine and Pulmonary Disease, I find that the opinion of Dr. Pohl is not well reasoned and afford it little probative value.

Dr. Krawtz, Board certified in Internal Medicine, Pulmonary Disease, Critical Care, and a B reader, interpreted Mr. Knight's x-ray as category 1/1 with "bilateral interstitial lung disease consistent with asbestos exposure/asbestos-related lung disease (CX 6). While I note that the phrase "consistent with" is not a direct diagnosis of asbestosis, I recognize Dr. Krawtz' superior credentials and give probative value to his conclusion that Mr. Knight's condition is "consistent with" asbestos exposure. As this x-ray interpretation was performed in 1999, before Mr. Knight's lung cancer developed, it is silent as to whether such a condition would cause or aggravate lung cancer. As such,

I afford it less probative weight in determining whether Mr. Knight's lung cancer was caused by or aggravated by conditions at JSI.

Dr. Daum, Board certified in Internal Medicine, Pulmonary Disease, Preventative Medicine, and a B reader, interpreted two x-rays of Mr. Knight and read them as category 2/1 with asbestos-related changes (CX 11). The first x-ray is dated in 1992, before the onset of lung cancer. The second x-ray date is unclear, as the identification area states "no date 6/29/00." This x-ray may or may not have been taken before the onset of cancer. Regardless of the date, and despite noting "asbestos related changes," Dr. Daum is silent as to whether the changes observed would cause or aggravate Mr. Knight's lung cancer. As the opinion is silent, I afford it less probative value in determining whether Mr. Knight's lung cancer was caused by or aggravated by conditions at JSI.

Dr. Yergin noted a total of 17 historical or ongoing illnesses affecting Mr. Knight (EX F; CX 20). Dr. Yergin opined that Mr. Knight did not suffer from asbestosis and that even if he had been exposed to asbestos, "such exposure, if any, did not cause, contribute to, or in any way aggravate his multiple medical problems or his resulting death." Dr. Yergin noted all of the primary care physicians who did not diagnose asbestos-related illnesses. The Doctor then stated that the American Thoracic Society laid out the proper clinical steps in making an asbestos-related diagnosis. Dr. Yergin stated that such steps include: (1) a history of significant exposure; (2) bilateral basilar crepitations or rales; (3) x-ray findings consistent with bi-basilar fibrosis, diaphragmatic calcifications, pleural thickening, and pleural calcifications; and, (4) pulmonary function studies reflecting a reduction in diffusing capacity. Dr. Yergin noted that while the calendar years worked by Mr. Knight were available, there was no indication of the quantity or duration of Mr. Knight's exposure to asbestos to make a reasonable diagnosis. Dr. Yergin noted that no crepitations or rales were found by any physician. Dr. Yergin noted that while some fibrosis and pleural thickening was found, such a diagnosis alone is a nonspecific finding, only supportive of an asbestos-related injury if corroborated by other criteria. There were no findings of diaphragmatic calcifications or pleural calcifications. Finally, no pulmonary function studies diagnosed reduced diffusing capacity.

Dr. Yergin used this clinical method and data to discount the findings of Dr. Sharpe and Dr. Pohl. Dr. Yergin then

theorized that given insufficient objective data to make an asbestos-related diagnosis, Mr. Knight's 150 pack year history of cigarette smoking was the actual cause of Mr. Knight's lung cancer. Dr. Yergin's opinion is well reasoned, based upon objective evidence, and I afford it great weight.

I find that Mr. Knight did not have work-related asbestos exposure which caused or aggravated his squamous cell lung cancer. Dr. Pohl is the only physician on record to opine a connection between asbestos exposure and lung cancer, and his opinion has been held to not be well reasoned. Despite agreement on the record that asbestos exposure and cigarette smoking increase 50 fold a person's chances of contracting lung cancer, credible exposure to asbestos has not been established, nor does the medical evidence establish that Mr. Knight's alleged asbestos exposure, either singly or coupled with Mr. Knight's smoking history, caused or aggravated Mr. Knight's lung cancer. Taken as a whole, the preponderance of medical evidence and witness testimony does not support the finding of a work-related illness or injury.

Responsible Carrier/Bondholder

Here, no credible injurious exposure was found. As such, neither of the Carriers is held to be a responsible carrier as defined by the Act and relevant case law. However, if a work-related occupational disease had been established, the record shows that the last asbestos abatement performed at JSI was aboard the U.S.S. Marshfield.

In occupational disease cases, the last employment in which a claimant is exposed to injurious stimuli is liable for the full amount of the award. *Traveler's Ins. Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955), cert. denied, 350 U.S. 913 (1955). Where exposure to injurious conditions occurred in the service of a last responsible employer who was covered by multiple insurance carriers, the last carrier during the exposure period is the responsible carrier. *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 752 (1st Cir. 1992); *Perry v. Jacksonville Shipyards*, 18 B.R.B.S. 219, 221 (1986).

CNA provided JSI's insurance coverage from July 1, 1987 through June 30, 1989. As the U.S.S. Marshfield abatement was completed in March 1989, had a work-related occupational disease been established, CNA would have been the last carrier during

the alleged injurious exposure period, and as such, CNA would have been the responsible carrier.

Entitlement

Mrs. Ruth Knight, Widow of Calvin A. Knight, has not established entitlement to benefits under the Act.

Attorney Fees

The award of an attorney's fee is permitted only in cases in which the Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

ORDER

Based on the Findings of Fact and Conclusions of Law expressed herein, it is, ORDERED that:

The claim of Ruth Knight for Widow’s benefits and funeral costs under the Act is hereby DENIED.

A

Robert L. Hillyard
Administrative Law Judge